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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 509

Cases No. 525: HAMADEH-BANERJEE
No. 526: HAMADEH-BANERJEE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Arnold Kean;

Whereas at the request of Lina Hamadeh-Banerjee, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 June and 15 August 1989, the time-limit for the filing of two applications to the Tribunal;

Whereas, on 31 July 1989, the Applicant filed two applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 November 1989, the Applicant, after making the necessary corrections, again filed two applications, the first one in case No. 525, concerning "medical evacuation" (hereinafter referred to as the "first case"), the second one in case No. 526, concerning "change of country of home leave" (hereinafter referred to as the "second case").

Whereas the pleas in the application in the "first case" read as follows:

"II. PLEAS

7. With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;
(b) To consider the present application receivable under article 7 of its Statute;
(c) To decide to hold the oral proceedings of the Tribunal on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules.

8. On the merits, the Applicant requests the Tribunal:

(a) To rescind the Secretary-General's decision of 8 December 1988 in which he maintained his earlier decision concerning the Applicant's medical evacuation from Afghanistan in August 1986:

(i) That the Applicant was entitled to a daily subsistence allowance [DSA] equivalent to 50% of the Riyadh rate, during her stay in New York to give birth to her second child Ishan;
(ii) That her son Kiran, who accompanied his mother, (and whose return air fare from Kabul to Riyadh had been, subsequently, authorized), was not entitled to a daily subsistence allowance during his stay with his mother in New York;
(iii) That the travel of her newly born child, Ishan, to Kabul, should be limited to Riyadh-Kabul costs and not New York (his birth place) to Kabul;

(b) To find that the Respondent, having already rejected the Applicant's request for change of country of home leave, was fully aware that the Applicant's country of home leave was physically inaccessible to her; therefore it was accepted that New York would be the actual place of medical evacuation, but that the travel costs will be payable as if the destination would be Riyadh and the related subsistence allowance would be paid at the New York or Riyadh rate whichever was lower;
(c) To find that the applicable rules and instructions and, in particular, circular UNDP/ADM/PER/130/Add.1/Rev.2 entitled her to daily subsistence allowance at 100% level of the Riyadh rate;
(d) To find that the discretion vested in the Secretary-General under rule 107.15(h) was exercised arbitrarily, and that it should be exercised in a fair and consistent manner, and therefore payment of a DSA should be made for the Applicant's son Kiran

for the duration of his stay in New York with his mother as well as for official stopover travel time as authorized accompanying family member on medical evacuation;

(e) To find that under rule 107.2(b) Ishan's travel to Kabul should have been authorized from New York to Kabul, and not from Riyadh, since the place of his father's recruitment by the UNDP [United Nations Development Programme] in 1968 was Washington D.C.;

(f) To find that the United Nations contribution towards daily subsistence allowance on medical evacuation should apply consistently to Ishan during his stay in New York;

(g) To order that the Applicant is entitled to 100% DSA of the Riyadh rate during her stay in New York and therefore to order payment of the difference between what she received and what she is due;

(h) To order DSA payment for Ishan for the duration of his stay in New York following his mother's confinement as an eligible accompanying family member;

(i) To order payment of Ishan's ticket from New York to Kabul and to refund the Applicant for the difference in cost between the New York/Kabul and Riyadh/Kabul fares;

(j) To order payment of Kiran's DSA for the duration of his stay in New York with his mother and for official stopover travel time Kabul/Riyadh/Kabul, as an authorized accompanying family member."

Whereas the pleas in the application in the "second case" read as follows:

"II. PLEAS

7. With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;

(b) To consider the present application receivable under article 7 of its Statute;

(c) To decide to hold the oral proceedings of the Tribunal on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules.

8. On the merits, the Applicant requests the Tribunal:

(a) To rescind the three conditions to which the decision of the Secretary-General, contained in the letter of 3 November 1988, to authorize a change in the country of home leave from Saudi Arabia to Bahrain, is subjected;

(b) To find that the first condition that the change is to be effective from 19 January 1988, the date of the issuance of circular UNDP/ADM/88/2, would effectively deprive her, under staff rule 105.3, of the entitlement to accelerated home leave in 1987;

(c) To find that the circular UNDP/ADM/88/2 is irrelevant to the request of the Applicant since this circular in no way alters or otherwise modifies the basic requirements for change of country of home leave set out in staff rule 105.3 (d)(iii) and that its provisions essentially refer to a change of country of home leave on alternate home leaves;

(d) To find that the restriction to the date of the circular effectively denies the Applicant her right to avail herself of her entitlement to home leave, during a two year period, during which she was entitled alternately to home leave or accelerated home leave every twelve months;

(e) To find that the Respondent, having authorized the Applicant's accelerated home leave to Geneva at United Nations expense on the understanding that the Applicant 'would reimburse costs should the appeal be successful or if there is no decision by 31 December 1987', has to honour its commitment since the Respondent procrastinated in submitting the reply on 29 July 1988, and the outcome of the appeal was met;

(f) To find that the second condition, that any additional costs above the entitlement to home leave to Saudi Arabia be borne by the Applicant, is null and void;

(g) To find as a matter of equity that staff rule 105.3 (a) is unequivocal in describing the entitlement to home leave 'at United Nations expense' and draws no distinction in the way 'UN expense' can be interpreted and therefore applies to all those who are entitled in the same manner;

(h) To find that the third condition that the change of country of home leave is to Bahrain and not to Geneva was made by the Joint Appeals Board invoking the grounds of close family relative in Bahrain was prejudiced since Geneva satisfies both requirements of 'family or personal ties' as per staff rule 105.3 (d)(iii);

(i) To order the Respondent to cover the Applicant's home leave costs for 1987 which she is being effectively denied due to no fault of her own and solely to the unnecessary delay attributable to the Respondent;

(j) To order [the Respondent] to rescind the second condition and to order that the cost of travel to the new country of home leave be at UN expense in the same manner as any other staff member who is entitled to home leave;

(k) To fix pursuant to article 9, paragraph 1 of the Statute, that the change of country of home leave travel should be:
(i) effective retroactively to the date of Applicant's original request in 1986;
(ii) to Geneva, Switzerland, where family and personal ties for her and her children are stronger than Bahrain;
(iii) at the full cost of the United Nations."

Whereas the Respondent filed his answer in the "first case" on 3 April 1990;

Whereas the Respondent filed his answer in the "second case" on 20 July 1990;

Whereas the Applicant filed written observations in the "first case" on 30 July 1990;

Whereas the Applicant filed written observations in the "second case" on 28 September 1990;

Whereas, on 1 February 1991, the President of the Tribunal ruled that no oral proceedings would be held in the cases;

Whereas the facts in the cases are as follows:

The Applicant entered the service of the United Nations on 1 December 1972, as a Professional Trainee at the United Nations Economic and Social Office in Beirut. She was initially offered a two-year fixed-term appointment at the P-1 level. The Applicant resigned from the Organization effective 1 July 1974, and re-entered the service on 17 February 1975, as an Associate Social Affairs Officer at the P-2, Step I level. The Applicant's appointment became permanent on 1 February 1977. She was transferred to the United Nations Development Programme (UNDP) on 8 May 1978.

On 17 March 1983, the Applicant married a staff member of UNDP, Mr. Somendu Kumar Banerjee. The Applicant is a national of Saudi Arabia. Her husband is a national of India.

On 1 May 1985, the Applicant's husband was assigned to Kabul, Afghanistan, as UNDP Resident Representative. The Applicant was also assigned to Kabul, as Programme Development Adviser for the United Nations Fund for Population Activities. The Applicant remained in Kabul until 19 July 1988. Kabul is a hardship duty station with a home leave cycle of 12 months.

In a memorandum dated 24 April 1985, the Applicant requested the Deputy Director, Division of Personnel (DOP), to change the designation of her country of home leave from Saudi Arabia to Switzerland. According to the Applicant, she would "be legally denied departure from [Saudi Arabia] without [her] father's permission". She explained that under Saudi law, marriage to a foreigner cannot be recognized without prior permission from the Ministry of the Interior. Since her father had failed to secure the proper authorization, he remained the Applicant's legal guardian and, consequently, could prevent her effectively from fulfilling her professional obligations and from returning to her husband and her immediate family once she had entered Saudi Arabia. The Applicant chose Geneva as an alternate place of home leave since her sister resided there.

In a reply dated 22 May 1985, the Deputy Director, DOP, rejected her request on the grounds that the applicable rules did not allow for an exception. In a letter dated 30 May 1985, the Applicant reiterated her request. She questioned whether section 30604(4) of the UNDP Personnel Manual was applicable to her case and gave additional reasons in support of her request.

An exchange of correspondence ensued between the Applicant and the UNDP Administration. The Applicant argued essentially that her difficulties in returning to Saudi Arabia were not purely of a personal nature but were rather "administrative and legal in character". She suggested that Bahrain, as "a neighbouring country", was a further option since another sister resided there. The UNDP Administration maintained its position, but considering that the Applicant had last exercised her right to home leave

travel in 1981, authorized her to travel to Geneva, against her entitlement Kabul/Riyadh/Kabul, on the understanding that she would spend her next home leave in Saudi Arabia. The Applicant took her home leave in Geneva, in July 1985.

In a letter dated 11 December 1985, the Applicant asked the then Administrator of UNDP to review the decision by UNDP to deny her a change in the designation of place of home leave from Riyadh, Saudi Arabia, to Geneva, Switzerland. In a reply dated 28 January 1986, the Director, DOP, informed the Applicant that, after carefully reviewing her case, in light of the provisions of staff rule 105.3(d)(iii), the Administration had found no evidence that she had maintained normal residence in Switzerland for a prolonged period prior to her appointment to the Organization. In fact, there was no record of any period of residence in Switzerland. Since the rule's first condition for an exception had not been met, the fact that her sister resided in Switzerland became irrelevant.

On 12 March 1986, the Applicant asked the Director, DOP, to "reconsider [her] request for a change in the designation of home leave country from Riyadh, Saudi Arabia to a neighbouring country, namely, Bahrain" where she could maintain her "cultural and social links" and where she also had family. This request was also denied on 26 March 1986, by the Director, DOP.

On 8 April 1986, the Applicant wrote to the Joints Appeals Board (JAB) and her communication was treated by the Respondent as a request for review of the administrative decision rejecting her request for a change in the designation of place of home leave.

On 16 April 1986, the Applicant wrote to a Personnel Officer at Headquarters, requesting medical evacuation to give birth to her second child, in light of her age and due to the lack of adequate facilities in Kabul. She asserted that it would not be possible to return to her home country and requested authorization to be evacuated to New York City under the medical care of the same physician who had delivered her first child. The Applicant also requested authorization to be accompanied by her husband and her son Kiran.

On 2 May 1986, the UN Medical Director authorized the Applicant's medical evacuation to Riyadh or to an equivalent destination. However, he

did not recommend that the Applicant's husband or child be authorized to accompany her. In a cable dated 8 July 1986, the Personnel Officer informed the Applicant of the UN Medical Director's decision and stated that daily subsistence allowance (DSA) would be payable to her in accordance with the circular UNDP/ADM/PER/130/Add.1/Rev.2 and at the New York rate, unless it was higher than the Riyadh rate.

The Travel Section authorized the Resident Representative to make arrangements for the Applicant's travel within the entitlement Kabul/Riyadh/Kabul. An advance of DSA for 30 days at Riyadh rates and two days stopover in Delhi was authorized in Kabul by the Resident Representative. An additional advance of US$2,000 was authorized upon the Applicant's arrival in New York by the Division of Personnel.

The Applicant travelled to New York, paying the additional costs of the journey from Riyadh to New York herself. She gave birth to her son Ishan on 9 September 1986. The UNDP Administration agreed to cover the cost of his travel up to an amount equivalent to the fare from Riyadh to Kabul.

On 3 October 1986, the Applicant lodged an appeal with the JAB in the "second case" concerning her request to change her country of home leave.

In a letter dated 8 October 1986, the Applicant requested the Personnel Officer to make the necessary arrangements to pay her the balance of her entitlements during the period of her confinement.

On 11 March 1987, the Applicant wrote to the Personnel Officer, asking him to act on her accelerated home leave travel to Geneva, scheduled for 23 June to 23 July 1987. In a reply dated 24 April 1987, he informed the Applicant that the Administration could not approve travel on home leave to Geneva again. Since she had not spent her last home leave in Saudi Arabia, under section 30703 of the UNDP Personnel Manual, she was obliged to exercise her 1987 entitlement as regular home leave, which required spending at least two weeks in her recognized country of home leave (Saudi Arabia).

In a cable dated 1 May 1987, the Travel Section informed the Applicant that, in connection with her pending claim for DSA during the period of her confinement, UNDP would proceed to recover an amount of US$2,396.88 from her, on the grounds that the Kabul Office had paid her an "excess DSA advance" using the full New York rate of DSA instead of 50 per cent of the Riyadh rate.

In a letter dated 3 May 1987, the Applicant requested the Secretary of the JAB for compensation for the loss of home leave and accelerated home leave entitlements during the appeal period. In a cable dated 13 May 1987, the Personnel Officer explained that although no exception could be granted, as a temporary solution, UNDP was willing to authorize travel to Geneva as requested by the Applicant, provided she would agree to reimburse the costs involved if her appeal should be unsuccessful or at the latest, by 31 December 1987. The Applicant accepted the offer and travelled on accelerated home leave to Geneva between 23 June and 23 July 1987.

In a letter dated 19 May 1987, the Applicant asked the Deputy Director, DOP, to review the administrative decisions regarding her medical evacuation.

In a cable dated 21 May 1987, the Applicant was informed that the Administration had exceptionally approved payment of her oldest son Kiran's return ticket to Riyadh, but no approval had been given for payment of DSA for either of her children. She was further advised that, in accordance with paragraph 2 of UNDP/ADM/PER/130/Add.1/Rev.2, the Organization's responsibility with respect to her DSA was limited to payment of DSA at the 50 per cent rate, since the authorized place of her medical evacuation was her place of home leave (Riyadh).

On 16 December 1987, after an exchange of correspondence with UNDP, the Applicant lodged an appeal with the JAB in the "first case" concerning medical evacuation.

On 31 October 1988, the JAB adopted its report in the "second case". Its conclusions and recommendation read as follows:

"Conclusions and recommendation

The Majority of the Panel:

24. Concludes that with the issuance of circular UNDP/ADM/88/2, UNDP, without departing from the basic principle governing the home leave entitlement set out in staff rule 105.3, intended to introduce a reasonable degree of flexibility in the application of the said principle, thereby departing from the narrow interpretation favoured by the Administration for more than 40 years.

25. Also concludes that the social and religious conditions prevailing in the appellant's home country, whereby a woman must obtain the permission of the Ministry of the Interior in order to legally marry a foreigner, such permission being withheld when the foreigner is not from one of the three recognized faiths (Islam, Christianity and Judaism), resulting in a situation where the woman remains the legal ward of her father, restricting her freedom of movement in and out of the country, apply not only to the appellant, but to all Saudi women in a similar position, and that, therefore her difficulties are not of a 'purely personal nature'.

25[sic]. Further concludes that these conditions which make it unsafe for the appellant to return to her home country are sufficiently abnormal to justify an exception to the rules.

26. In addition concludes that, should an authorization of a change in the designation of the country of home leave be granted, such designation should be Bahrain as a neighbouring country, since the appellant does not have any close relatives in Geneva as specified in paragraph 4 of UNDP/ADM/88/2, and since this would be in keeping with the spirit of staff regulation 5.3.

27. In light of the foregoing recommends that the appellant's request for a future change in her country of home leave from Saudi Arabia to Bahrain be favourably reviewed, on the understanding that, if granted, this authorization would constitute a temporary and exceptional designation of an alternate home leave country, and provided that the appellant's travel to the alternate country will be subject to a cost limitation based on what the travel would cost to her regular country of home leave and that any additional cost above that which would be applicable to the designated home leave country is to be paid by the staff member herself."

On 3 November 1988, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined her case (the "second case") in light of the Board's report, had decided:

"to authorize [her] requested change of country of home leave from Saudi Arabia to Bahrain in accordance with circular UNDP/ADM/88/2 of 19 January 1988, on a temporary and exceptional basis, with effect from the date of

issuance of the circular, provided that any additional costs above [her] entitlement to home leave travel to [her] country of nationality under staff rule 105.3 be borne by [herself]".

On 28 November 1988, the Board adopted its report in the "first case". Its conclusions and recommendation read as follows:

"Conclusions and recommendation

40. The Panel concludes that the appellant's authorized place of medical evacuation was her place of home leave, Riyadh or equivalent destination, and that, therefore, she was entitled to DSA at 50% of the lower Riyadh rate, as stipulated in paragraphs 2 and 4 of circular UNDP/ADM/PER/Add.1/Rev.2.

41. The Panel also concludes that, although the appellant's older son was never given the status 'authorized accompanying family member' by the Medical Director, which is necessary for the application of paragraph 2 of the same UNDP circular, it is clear from UNDP correspondence with the appellant that payment for the boy's travel was authorized by Personnel on an exceptional and generous basis, with no entitlement for DSA.

42. The Panel further concludes with regard to the appellant's younger son, the following:

(a) Since the appellant was officially on medical evacuation to her home country, Saudi Arabia, as can be seen from her travel authorization, Kabul/Riyadh/Kabul, the baby's entitlement could only be calculated as if he had been born in Riyadh;

(b) Since no provisions are made in the relevant UNDP documents regarding DSA for newborn babies and in view of the inter-office memorandum of 26 February 1986 reflecting UNDP's policy that no medical evacuation DSA should be paid for infants after birth, the appellant was not entitled to DSA for him for the period following his birth until their return to Kabul.

43. In light of the foregoing, the Panel makes no recommendation in favour of the appeal."

On 30 November 1990, the Applicant filed with the Tribunal the applications referred to earlier.

On 8 December 1988, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined her case (the "first case") in light of the Board's report, had decided:

> "to maintain the contested decisions concerning [her] medical evacuation from Afghanistan in August 1986 to [her] place of home leave or to an equivalent destination, in accordance with the relevant provisions of circular UNDP/ADM/PER/130/Add.1/Rev.2, and to take no further action in this matter".

At the Applicant's request, on 9 December 1988, the Under-Secretary-General for Administration and Management informed the Applicant that instruction UNDP/ADM/88/2 could not be applied retroactively and that for future home leave to Bahrain, granted pursuant to Instruction UNDP/ADM/88/2, the reimbursement would be limited to the costs of travel to Saudi Arabia.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Applicant should be paid DSA at 100 per cent of the Riyadh rate, rather than at 50 per cent of the Riyadh rate.

2. DSA for the Applicant's son Kiran should be paid during his stay with his mother in New York.

3. The newly born son Ishan's full air fare should be paid from his place of birth, New York, to Kabul, not from Riyadh, along with DSA during his stay in New York following his mother's confinement.

Whereas the Respondent's principal contention in the "first case" is:

The discretionary decisions made in the context of the Applicant's medical evacuation for delivery of her child were in compliance with the relevant staff rules and UNDP circulars.

Whereas the Applicant's principal contentions in the "second case" are:

1. The decision by the Respondent authorizing a change in the country of home leave from Saudi Arabia to Bahrain, effective 19 January 1988, should be amended to cover retroactively the Applicant's 1987 accelerated home leave to Geneva.

2. The Respondent's decision should be revised to allow designation of Switzerland as the Applicant's country of home leave.

3. The Respondent should bear the full cost of home leave to the newly designated country, revising the condition in the 3 November 1988 decision that costs above travel to the Applicant's originally designated home country, Saudi Arabia, should be borne by the Applicant.

Whereas the Respondent's principal contentions in the "second case" are:

1. The denial by the Respondent of the Applicant's request for a change in the designation of the country of home leave effective 1986, complied with the applicable staff rules and sections of the UNDP Personnel Manual pertaining to home leave entitlement.

2. The Respondent's later decision pursuant to new instruction UNDP/ADM/88/2 of 19 January 1988, to change the country of home leave from Saudi Arabia to Bahrain, but to limit the cost of travel of the Applicant to the new country of home leave, Bahrain, to the cost of travel to her original country of home leave, Saudi Arabia, complies with the applicable rules.

3. The denial by the Respondent of the Applicant's request to cover the costs of her accelerated home leave travel on alternate home leave to Geneva in 1987, is a consequence of a written agreement.

The Tribunal, having deliberated from 19 February to 28 February 1991, now pronounces the following judgement:

I. Since the appeals in cases Nos. 525 and 526 involve the same Applicant and are related, the Tribunal considers them together.

II. In case No. 525, the Applicant appeals from a decision of the Secretary-General dated 8 December 1988, maintaining contested disallowances of amounts claimed by the Applicant arising out of the Applicant's medical evacuation from Afghanistan in August 1986. A Joint Appeals Board (JAB)

report dated 28 November 1988, made no recommendation in favour of the Applicant's appeal. The Applicant asks the Tribunal to rescind the Respondent's decision of 8 December 1988 and to determine that, since her country of home leave, Saudi Arabia, was physically inaccessible to her, New York should be considered as its equivalent and regarded as the authorized place of medical evacuation and that her daily subsistence allowance (DSA) should be paid at 100 per cent of the New York or Riyadh rate, whichever is lower. The Applicant also asks that DSA should be paid for the Applicant's son Kiran for the duration of his stay in New York with her, as well as his stopover travel time as an authorized accompanying family member on medical emergency; that her newborn son Ishan's travel to Kabul should have been authorized from New York to Kabul, and that DSA should have been applicable to Ishan during his stay in New York.

III. By way of background, the Tribunal notes that the Applicant is a national of Saudi Arabia with family residing there at the time of the events which gave rise to this appeal. Following her marriage in March 1983, to an Indian national of the Hindu faith, who is also a United Nations staff member, in April 1985, the Applicant requested a change in the designation of her home leave place to Geneva, Switzerland, and later to Bahrain. Issues relating to the requested change are the subject of case No. 526.

IV. The Applicant's allegations that her marriage was contrary to her father's wishes and was entered into without the permission of her government to marry a non-Saudi, prompted her requested change. There is evidence that under Saudi law, government permission is required for marriage to a non-Saudi national. A marriage entered into without the government's permission is allegedly not considered valid in Saudi Arabia. The Tribunal is informed by the Applicant that non-Saudi spouses and children resulting from such marriages can be denied entry visas to Saudi Arabia, and that children from such marriages are not entitled to Saudi citizenship.

V. In addition, the Applicant alleges that Saudi females whose marriages are not recognized remain wards of their male legal guardians who normally are fathers or brothers. According to the Applicant, a female ward does not have the freedom to leave Saudi Arabia without her guardian's permission.

VI. At the time of the Applicant's medical evacuation to give birth to her second child, her application for change in the designation of home leave country had not been approved. She therefore requested authorization for medical evacuation to New York City, both for medical reasons and because she was fearful that if she went to Saudi Arabia to give birth, she might not be permitted to leave that country. Although the Applicant was not barred from traveling to New York to give birth, her medical evacuation travel costs were approved for Kabul/Riyadh/Kabul, or equivalent destination. In other words, medical evacuation was authorized to her place of home leave, Saudi Arabia. This approval did not include her spouse who was then also stationed in Kabul or her son, who was two years and nine months old.

VII. With respect to the Applicant's claim of entitlement to DSA at 100 per cent of the Riyadh rate, the Tribunal finds, as did the JAB, that the Applicant was aware before her departure that the authorized place of her medical evacuation was Riyadh or "equivalent" (emphasis added). Contrary to the Applicant's suggestion, the Tribunal understands "equivalent" to mean a place in Saudi Arabia other than Riyadh. For it is clear beyond any doubt that the Applicant's place of home leave, then Saudi Arabia, was the place being authorized for medical evacuation. In view of this, it follows that the Applicant's arguments concerning her DSA are lacking in merit for they are based entirely on the notion that her medical evacuation was authorized to a place other than her place of home leave. The language of the applicable UNDP instruction could not be clearer in providing that, under the circumstances here, the Applicant was entitled to 50 per cent of the Riyadh DSA, as the JAB found.

VIII. With respect to the Applicant's contention that since her son Kiran was authorized to accompany her on her medical evacuation, he should also be

allowed DSA, there is likewise no merit in the Applicant's claim. Her contention is premised on the erroneous notion that the Applicant's son was authorized to accompany her. That is not what occurred. In fact, authorization for her son was denied, but he was nevertheless taken along by his mother on her trip to New York. As an exceptional act of generosity, the Administration, despite the lack of any obligation to do so, reimbursed the Applicant for the cost of a return ticket to Riyadh for her son. The Applicant's notion that staff rule 107.15 requires the conclusion argued by the Applicant is without any valid basis. The Tribunal finds, as did the JAB, that the Applicant's claim for DSA with respect to her son must fail.

IX. With respect to the Applicant's contention that the travel costs for her newborn infant son should cover air fare from New York to Kabul, the Tribunal concludes, as did the JAB, that the Respondent acted properly and in accordance with the Staff Rules in authorizing payment for the Applicant's newborn son from Riyadh to Kabul. The Applicant argues that staff rule 107.2 requires that the newborn's travel be paid from New York since the child's father was recruited in Washington, D.C. This is not what staff rules 107.2(a)(i) and 107.2(b), on which she relies, provide. The Tribunal finds that, since the authorized place of medical evacuation was the Applicant's place of home leave and since New York was not the place of home leave, but was the place she chose for the birth of her child, it was entirely reasonable and proper for the Respondent under staff rule 107.2(b) to pay the newborn's travel expenses on the same basis as hers - from Riyadh to Kabul. With regard to the Applicant's claim for DSA for the newborn child, the Tribunal finds, as did the JAB, that there is no provision for such a payment. The Respondent was therefore not required to make it. The Tribunal notes that once again, as an exceptional act of generosity, the Administration gave the Applicant a lump sum installation grant for her newborn son to which she would otherwise not have been entitled.

X. The Tribunal finds that the Applicant's arguments, rather than resting on a plausible reading of any of the applicable rules, appear to be

premised on the notion that her personal situation somehow entitled her to an exception from the applicable rules at the time of the events in question. The granting of exceptions is within the discretion of the Respondent, not the Tribunal. Only where there is evidence - not present here - that the Respondent's discretion was improperly exercised on the basis of unlawful or extraneous factors or was based on some material mistake of fact or law will the Tribunal review the matter. That incorrect estimates were initially used as the basis for advancing funds to the Applicant, or that a mistake or an exception in a unique situation may have been made, or a more than two-year-old child may have been involved in the case of another staff member, are totally irrelevant to the issue, as are the reasons which prompted the Applicant's choice of New York as the place for her medical evacuation. Indeed, if there were any relevance to the authorization of the advance payment received by the Applicant, the Tribunal would express the same grave concerns as the JAB with regard to the role of the Applicant's husband in authorizing the advance notwithstanding staff rule 104.10(c)(ii).

XI. In case No. 526, the Applicant appeals from a decision of the Secretary-General dated 3 November 1988 and clarified on 9 December 1988, in response to a letter from the Applicant dated 28 November 1988. The effect of the Secretary-General's decision and clarifying letter was to authorize, on a temporary and exceptional basis, a change in the Applicant's country of home leave from Saudi Arabia to Bahrain. This authorization was in accordance with circular UNDP/ADM/88/2 dated 19 January 1988, with effect from that date. As a result, any additional costs above the Applicant's entitlement to home leave travel to Saudi Arabia (her country of nationality) would have to be borne by her. Prior to 19 January 1988, the Applicant had taken accelerated home leave to Geneva, Switzerland, on the understanding that she would reimburse the Organization with respect to costs if her then pending appeal on the issue of her place of home leave was not resolved in her favour. Accordingly, the Respondent has taken the position that the Applicant must reimburse the Organization for the 1987 home leave.

XII. Although the Applicant had initially sought a change in her place of home leave from Saudi Arabia to Geneva, Switzerland, essentially for the reasons outlined in paragraphs III-V above, she later substituted Bahrain for Switzerland. Her request was considered under staff rule 105.3(d)(iii), which at the time provided:

> "The Secretary-General, in exceptional and compelling circumstances, may authorize as the home country, for the purposes of this rule, a country other than the country of nationality. A staff member requesting such authorization will be required to satisfy the Secretary-General that the staff member maintained normal residence in such other country for a prolonged period preceding his or her appointment, that the staff member continues to have close family or personal ties in that country and that the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3."

XIII. The Applicant's pleas before the Tribunal are somewhat broader than merely seeking to establish her position as to the effective date of the Secretary-General's decision with regard to the Applicant's request for a change in the place of her home leave. She now asks that: (a) the effective date of the authorized change in her place of home leave be rescinded; (b) her 1987 home leave costs be borne by the Organization; (c) future costs of home leave travel to a new country be paid in full without any limitation related to the costs of home leave travel to Saudi Arabia; and (d) her place of home leave be established by the Tribunal as Geneva, Switzerland, and that this be done retroactively to the date of the Applicant's original 1986 request, with full costs associated with such a change being borne by the UN.

XIV. The Tribunal finds no merit in any of the Applicant's contentions. Most of them are fundamentally flawed by the Applicant's failure to recognize, as in case No. 525, that the Tribunal's function is to determine whether the Staff Rules and related Instructions have been applied in accordance with their terms and whether the reasonable discretion which the Secretary-General has in applying or allowing exceptions to the Rules has been exercised in a lawful manner or was tainted by some impropriety or

error of fact. The Tribunal's consistent jurisprudence that it is not empowered to ignore the Staff Rules or to create exceptions to them is plainly applicable here.

XV. Even assuming, for the sake of discussion, that the Applicant's situation in Saudi Arabia would be precisely as she described it, and, in addition, that there is a valid reason for her apparent disinterest in taking home leave at her husband's place of home leave, the fact remains that staff rule 105.3 did not compel the Respondent to come to any conclusion other than that reached when the Respondent denied the Applicant's initial request for a change in her place of home leave to Switzerland and her later request for a change to Bahrain. The Respondent's interpretation of the staff rule was entirely permissible and did no violence either to its language or to its purpose. The Applicant simply did not meet the requirements of the staff rule and it is irrelevant whether her situation is to be regarded as one involving personal circumstances or a reflection of a broader issue, or whether the denial of an exception might cause the loss of an entitlement to accelerated home leave. It was properly within the discretion of the Secretary-General to evaluate and balance the interests involved in deciding whether to make an exception for the Applicant and, if so, when and to what extent.

XVI. The Applicant is wrong in her belief that she prevailed in her appeal before the JAB. Her JAB appeal was predicated on her claim that she was entitled to the grant of her requested change in her place of home leave even before the issuance, in January 1988, of circular UNDP/ADM/88/2, which provided an increase in the flexibility allowed the Administration in permitting temporary exceptions to the rules previously applied with regard to changes in the place of home leave.

XVII. The JAB report makes it clear that, in view of the JAB, but for the issuance of the UNDP circular, there would have been no basis either in the language of the staff rule or the practice under it for granting the exception sought by the Applicant. Consequently, the Applicant's assertion

that she should not be required to reimburse the Organization for her 1987 home leave is mistaken. The regime established in January 1988 by the circular was prospective in nature and there is nothing that required the Respondent to apply it retroactively.

XVIII. Nor is there anything that required the Respondent to authorize Geneva, Switzerland, instead of Bahrain. The authorization of Bahrain was based on wholly rational considerations and was at one time the Applicant's own choice. Similarly without merit is the Applicant's contention that it is improper for the Respondent to condition the grant of an exceptional and temporary change in her place of home leave by requiring her to pay the difference, if any, should the cost be greater for home leave to Bahrain than to Saudi Arabia. This is an entirely reasonable condition and is well within the Respondent's discretionary authority. It is absurd to suggest, as the Applicant does, that such a condition which legitimately protects the interests of the Organization is impermissible under staff rule 105.3, particularly since the basic principle is by no means foreign to the Staff Rules. See, e.g., staff rules 107.1(b) and (c) and it is analogous to the provisions of Personnel Manual 30703.1.2(2). See also staff rule 105.3(d)(ii) as reported in A/C.5/44/2 dated 20 September 1989.

XIX. For the foregoing reasons, the applications are rejected in their entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Arnold KEAN
Member

New York, 28 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary

DECLARATION BY MR. ROGER PINTO

(ORIGINAL: FRENCH)

I regret to have been unable to accept all of the reasoning developed by the Tribunal in its judgement. Regarding the result, my only point of dissent is the following: the Respondent's refusal to recognize a permanent change in the Applicant's country of home leave to Bahrain, allowing the normal payment of travel expenses and of transportation, appears to me, in the circumstances invoked by the Applicant which have not been contested by the Administration, to be contrary to the United Nations Charter, to the Universal Declaration of Human Rights and to the Charter on Civil and Political Rights, the strict observation of which is imposed on the Organization of the United Nations.

(Signature)

Roger PINTO
President

New York, 28 February 1991

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/510
28 February 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 510

Case No. 547: CAMARA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Luis de Posadas Montero;

Whereas, at the request of Athanase Camara, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 23 August and 23 November 1989, 23 February and 23 April 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 20 April 1990, the Applicant filed an application, containing the following pleas:

"II. PLEAS

10. With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;
(b) To find that the present application is receivable under article 7 of its Statute;
(c) To decide to hold oral proceedings of the Tribunal on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules;

11. On the merits, the Applicant requests the Tribunal:

(a) To find that Applicant's dismissal for misconduct, with effect from 1 January 1987, was wrongful and without just cause;
(b) To find that the Administration of the United Nations Development Programme did not apply any part of the procedures set out in Chapter IX/20902 of the UNDP Personnel Manual for Locally Recruited Staff and therefore;
(c) To find that the Applicant was denied equal treatment;
(d) To order the Respondent to rescind his decision to dismiss the Applicant for misconduct;
(e) To order the Respondent to reinstate Applicant into the employ of the United Nations Development Programme, Conakry, Republic of Guinea with the effective date of 1 January 1987;
(f) To order the Respondent to pay the Applicant full salary and allowances as of 1 January 1987;
(g) To order the Respondent to reimburse Applicant all monies which were wrongfully and without just cause, deducted from his salary for a crime of which he was innocent and was proven to have been committed by another staff member for whose actions he cannot be held responsible;
(h) To order the Respondent to reimburse Applicant all monies which were, wrongfully and without just cause, deducted from his salary by reason of the alleged forgery of which he was innocent."

Whereas the Respondent filed his answer on 2 October 1990;

Whereas the Applicant filed written observations on 14 January 1991;

Whereas, on 1 February 1991, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 21 February 1991, the Tribunal put questions to the Respondent and on 22 February 1991, he provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 19 June 1975, as a locally recruited Librarian/Accounts Clerk at the Conakry Office. He served on a succession of short, fixed-term appointments until 1 January 1977, when he was offered a one-year

fixed-term appointment that was successively extended for furt one-year fixed-term periods until 31 December 1983.

In a memorandum dated 13 December 1983, the Applicant's supervisor informed the Applicant, through the Resident Representative, that, as he was dissatisfied with his work, he would extend his appointment for six months only, on a trial basis, leaving it to be decided later whether or not to extend him further. The Applicant's appointment was subsequently extended for further fixed-term periods, ranging from six mont to two months. He separated from the service of UNDP on 31 Ma 1986, when he was dismissed for misconduct.

During the first half of 1985, the Resident Representati determined that several cheques had been stolen from the offic on account of the Applicant's carelessness. A decision was ta at the time to deduct from the Applicant's salary the amount corresponding to two cheques which had been cashed by the perpetrator of the theft.

Also, during the first half of 1985, Rodolfo Scalla, a F and Agricultural Organization (FAO) expert who had worked on a UNDP project in Conakry during 1984, asked FAO to intercede on his behalf with UNDP in order to obtain payment of certain sum corresponding to the portion of his salary payable in local currency, that he had been unable to receive during his stay i Conakry. The Resident Representative in Conakry informed the authorities that no payments were pending since Mr. Scalla had been paid the portion of his salary payable in local currency 30 and 31 October 1984, by cheque. The Resident Representativ submitted cancelled cheques drawn on the Central Bank of Guine to the order of Mr. Scalla as proof thereof. On the reverse s of the cheques were Mr. Scalla's endorsement, his request that they be cashed by the Applicant, as well as the Bank's statemen to the effect that payment had been made to the Applicant. Up reviewing the cheques, Mr. Scalla stated in a letter dated 16 September 1985, to the Chief of Payments Authorization Bran

FAO, that the endorsements on the cheques were forged. In support of his contention, he submitted specimens of his signature.

On 11 March 1986, the Resident Representative asked the Applicant to provide his explanation of the facts. In a reply dated 12 March 1986, the Applicant asserted that he had cashed the cheques at Mr. Scalla's request and had given him the money. On 11 April 1986, the Resident Representative informed Headquarters of the Applicant's explanation. He stated that since he was unable to verify the authenticity of the signatures, he was not in a position "to apportion blame". He sought Headquarters' advice and recommended that FAO should make no payments to Mr. Scalla, pending the finalization of the investigation.

In a cable dated 7 May 1986, the Director, FAO Financial Services Division, advised UNDP Headquarters and the Resident Representative in Conakry, that Mr. Scalla had "reconfirmed" that he had never authorized the Applicant to cash cheques on his behalf, nor had he ever endorsed the cheques or received any money from the Applicant. In addition, he had received a sworn affidavit, containing a calligraphy report, attesting "without doubt" that Mr. Scalla's signature had been forged. He was therefore unable to withhold payment to Mr. Scalla any further.

On 11 June 1986, the Director of Finance, UNDP, requested the Resident Representative to conduct an investigation of possible forgery based on the calligraphy report provided by the FAO. In a cable dated 16 June 1986, the Resident Representative informed the Personnel Officer, as well as the Director of Finance, that he had decided to suspend the Applicant with pay due to serious misconduct and misappropriation of official funds, pending further investigation. In a letter dated 15 July 1986, he set forth the grounds for his decision. He referred to the calligraphy report in Mr. Scalla's case, as well as to "cases in the past where the [Applicant's] honesty and integrity were questioned". He specifically mentioned the prior case of stolen

cheques which had prompted him to accuse the Applicant of "gross negligence". He confirmed his decision to "suspend [the Applicant] immediately with pay pending Headquarters approval for separation from service".

In a letter dated 23 July 1986, the Resident Representative ad interim informed the Personnel Officer at Headquarters that he had discovered further evidence of the Applicant's dishonesty in connection with the payment of salaries to two other FAO experts, Mr. Westinga, and Mr. P. Grenereau, to whom cheques had not been delivered, even though the relevant payroll disbursement vouchers bore their signatures. He attached "self-explanatory" letters from both the experts. Mr. Westinga asserted that the signature on the payroll voucher was not his own, and that when he had inquired of the Applicant the whereabouts of his cheque, the Applicant had produced it from a drawer. As regards Mr. Grenereau, he asserted that he had never signed a payroll voucher. The Applicant, without any authority, had ordered a stop payment on the cheque, action which indicated to the Resident Representative that "he must have stolen the cheque".

On 8 August 1986, the Chief, Field Office Accounts Unit, Division of Finance (DOF), UNDP, and the Roving Finance Officer, DOF, UNDP, submitted a joint report on a mission they had undertaken to Conakry, in July 1986, to investigate a series of cases of stolen cheques at the Conakry Office. In addition, they investigated the alleged forging of the endorsement on Mr. Scalla's cheques, as well as the question of cheques not received by the experts Westinga and Grenereau. In their report on the Scalla, Westinga and Grenereau cases, they concluded that:

> "... it would appear that Mr. Camara was involved in these cases of misappropriation and unauthorized withholdings of funds. We therefore believe that the matters discussed above should be considered in determining whether disciplinary action should be initiated against him. Original documentation with Mr. Camara's handwriting as well as those of Messrs. Westinga and Grenereau have been submitted to the Internal Audit Section for their consideration."

Later in August, the UNDP Internal Audit Section, Division for Audit and Management Review (DAMR), consulted an expert in handwriting analysis (the "Manhattan Handwriting Consultant" firm). The reports from this firm concluded that the Applicant had in fact endorsed the two cheques which he claimed were endorsed by Mr. Scalla, and that he had also forged Mr. Westinga's name on a payroll form to obtain Mr. Westinga's cheque. However, the report concluded that it was unlikely that the Applicant had forged Mr. Grenereau's signature on the payroll voucher.

In a memorandum dated 4 December 1986, the Director, Division of Personnel (DOP), recommended to the UNDP Administrator that the Applicant be dismissed for misconduct. In support of his recommendation, he explained the circumstances of the Scalla case, as well as the case of the experts Grenereau and Westinga. In addition, he noted that the Administration had "carefully reviewed [the] matter including the staff member's previous service record and found that [the Applicant had] a history of questionable performance". He also recommended that no termination indemnity be paid to the Applicant under Annex III(c) to the Staff Regulations and Rules. On 10 December 1986, the Administrator approved the recommendations.

On 11 December 1986, the Senior Policy Officer advised the Resident Representative that the Administrator had decided to dismiss the Applicant for misconduct arising from his misappropriation of two official cheques payable to Mr. Scalla. He instructed him to withhold payment of any final entitlements due to the Applicant and to apply them against the Applicant's indebtedness to UNDP. This decision was communicated to the Applicant on 19 January 1987.

On 6 July 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board submitted its report on 10 October 1988. The Board's conclusions and recommendation read as follows:

"Conclusions and Recommendation

26. The Panel concludes that there is no reason to reconsider the Administration's decision to dismiss the appellant for misconduct since there is substantial evidence that he committed acts which did not befit his status as an international civil servant.

27. The Panel also concludes that the administrative decision of 11 December 1986 by which the UNDP Administrator dismissed the appellant for misconduct was justifiable on the basis of the evidence of the case.

28. The Panel further concludes that although the Administration did not strictly adhere to the requirements of due process set forth in the UNDP Personnel Manual, that failure did not result in a substantive miscarriage of justice or injury to the appellant to warrant a recommendation for compensation.

29. Accordingly, the Panel makes no recommendation in support of the appeal."

On 13 October 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision and to take no further action in his case.

On 20 April 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decisions in 1985, to deduct from the Applicant's salary the amount that a colleague had misappropriated and in 1987, to dismiss the Applicant for alleged misconduct violate the Applicant's rights in that they were based on mere accusations and opinions not supported by sufficient evidence.

2. The above-mentioned decisions were not in accordance with due process of law.

3. The Respondent has failed to comply with the relevant procedures laid down in Chapter IX of the UNDP Personnel Manual.

Whereas the Respondent's principal contentions are:

1. The UN Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standards of integrity and, therefore, he has the responsibility of determining definitively whether a staff member meets those standards.

2. The dismissal of the Applicant was preceded by ample opportunity for the Applicant to state his case, and the decision to dismiss him was not improperly motivated.

The Tribunal, having deliberated from 12 February to 28 February 1991, now pronounces the following judgement:

I. In his first substantive plea, the Applicant seeks the rescission of the Respondent's decision to dismiss him for misconduct with effect from 1 January 1987, under staff rule 110.3(b). The impugned decision results from specific charges levelled against the Applicant for alleged forgery and misappropriation of two official cheques payable to an FAO expert, Mr. Rodolfo Scalla. The Respondent considered the evidence against the Applicant conclusive and determined that the act of the Applicant constituted misconduct warranting dismissal.

II. Since this is a disciplinary case, it is pertinent to recall first the established jurisprudence of the Tribunal relevant to this case.

1. The Tribunal has consistently held that the Secretary-General has broad discretionary powers with regard to disciplinary matters and this includes determination of what constitutes misconduct, as well as the appropriate discipline.

2. However, the Tribunal has established its own competence to review such decisions. For example:

(a) In cases of failure to accord due process to the affected staff member before reaching a decision; or

(b) In cases where such a decision is based on a mistake of fact, or is arbitrary or is motivated by prejudice or by other extraneous considerations. (Cf. Judgements No. 210, Reid (1976), para IV, and No. 394, Armijo (1987), para. XII).

III. The Applicant, in this case, vehemently denies the charges, insists on his innocence and contests the decision on the following grounds:

1. It was wrongful and without justification;

2. The Respondent did not apply any of the procedures set out in Chapter IX, Section 20902 of the UNDP Personnel Manual for locally recruited staff and therefore,

3. The Applicant was denied equal treatment.

Those arguments, if valid, would amount to a claim of mistake of fact and lack of due process, rendering the decision reviewable by the Tribunal.

IV. In examining the case, the Tribunal notes that there is one fact beyond dispute. The Applicant acknowledges having cashed Mr. Scalla's two cheques. Apart from that, the Applicant and Mr. Scalla advance two completely opposing versions of the truth.

V. The Applicant claims that:

(a) Mr. Scalla had signed the relevant disbursement voucher;

(b) He did indeed cash the two cheques, but on the authority of Mr. Scalla, who had endorsed both cheques with an order to pay the sums to the Applicant.

VI. The Tribunal notes that on the back of the two cheques there is Mr. Scalla's endorsement, together with an order to pay the sum to the Applicant, as well as a statement by the bank to the effect that payments were made to the Applicant.

The endorsement and the cashing of the first cheque was on 3 November 1984 and of the second cheque on 8 December 1984. Therefore, it is a fact that on 3 November and 8 December 1984, the Applicant had in his possession the amount of the two cheques which he was supposed to remit to Mr. Scalla. The Applicant claims in this regard that Mr. Scalla received these amounts from his hands in both instances. In addition, the Tribunal notes that the Applicant fully identified himself at the bank when cashing the two cheques.

VII. The FAO expert, Mr. Scalla, on his part, insists that:

(a) He never endorsed the two cheques in question;

(b) He never gave authority to the Applicant; or

(c) Received money in exchange for the two cheques.

To confirm his affirmations, Mr. Scalla sent to UNDP, Conakry, nine specimens of his signature. He further submitted a report from a handwriting expert confirming that his endorsements were forged.

VIII. Confronted with a situation where it was the word of Mr. Scalla against the Applicant's, the Administration, in August 1986, submitted the matter to "Manhattan Handwriting Consultant", a New York firm, to perform handwriting analysis in order to determine whether the Applicant forged the signature of the FAO expert in question. The report from "Manhattan Handwriting Consultant" dated 1 September 1986, concluded that the Applicant had endorsed the two cheques which he claimed were endorsed by Mr. Scalla. The Tribunal notes that the experts were not asked specifically to verify the handwriting of the order to pay the sums on both cheques to the Applicant.

IX. On the strength of that report, the Respondent concluded that the culpability of the Applicant had been established, thus justifying the decision to dismiss him.

For such a decision to be considered valid, it must be shown that the staff member in question had been accorded full due process of law during the proceedings. The Tribunal will therefore examine if that was the case.

X. The Tribunal notes first that there is a procedure established by the Administration for dealing specifically with cases of misconduct for locally recruited staff members which is incorporated in Chapter IX, Section 20902 of the UNDP Personnel Manual.

The procedure laid down in the UNDP Personnel Manual contains safeguards for the staff member, intended to protect his or her rights, to secure an objective examination of the case and to contribute to the formulation of equitable decisions.

XI. The Respondent states that the Applicant was invited in a letter dated 11 March 1986, to explain why he had cashed the two cheques purportedly endorsed by Mr. Scalla. The Applicant sent a letter the following day, on 12 March 1986, stating that he had cashed the two cheques under the authority of Mr. Scalla who, according to the Applicant, had endorsed the cheques with an order for payment to the Applicant.

The Respondent took the view that the Applicant thus understood the charges against him and that he offered an explanation. Therefore, the Applicant was accorded due process.

XII. The Tribunal cannot consider the Respondent's view as sufficient to absolve the Administration from abiding by all the rules and procedures set out in the UNDP Personnel Manual. The fact that the Applicant was questioned and gave an explanation at the very early stage of the case is one thing, and the orderly and systematic application of the various steps enumerated in the UNDP Personnel Manual is a totally different thing.

XIII. This early questioning of the Applicant was not followed by the formulation of written charges of misconduct against him or by a request to give his version of the matter, or to suggest other persons of whom inquiry might be made and to call witnessess on his behalf, as paragraph 2 of Section 20902 of the UNDP Personnel Manual stipulates. None of these procedures were followed. On the contrary, when the Applicant proposed to call witnesses in his favour, they were not convoked.

XIV. According to paragraph 3 of Section 20902 of the UNDP Personnel Manual, the Applicant was entitled to obtain the advice of another staff member of his choice for the preparation of his defence. There is no indication that the Applicant was enabled to benefit from this guarantee.

XV. Paragraph 4 of Section 20902 of the UNDP Personnel Manual, refers to a very important and essential document required in cases of misconduct. It is the report to be prepared by the Resident Representative on the case. Paragraph 4 takes care to regulate the contents of the report, the modalities of its communication to the staff member and to the Director of Personnel and the Administrator of UNDP. The rules concerning the report contain a number of guarantees for the rights of staff members to defend themselves.

The Tribunal notes that this report, as provided for in paragraphs 4, 5 and 6, was never prepared, thus, infringing on the rights of the Applicant to full and equal protection under the procedure established by the Administration.

XVI. The Tribunal notes that this lack of due process shown during the course of the proceedings was repeated during the final disposal of the case by the Administrator.

In the confidential memorandum of 4 December 1986, setting the stage for the Applicant's dismissal for misconduct in connection with Mr. Scalla's cheques, the Tribunal finds that:

Firstly: Previous cases of negligence and deficient performance were linked to the case of misconduct, though they had no relevance to the case.

Secondly: In the same memorandum, the allegations made against the Applicant, concerning two other experts, Mr. Westinga and Mr. Grenereau, were presented to the Administrator as established facts, without subjecting them to the procedures provided for in the UNDP Personnel Manual. Thus, the isolated act of alleged misconduct concerning the two cheques of Mr. Scalla, was extended to include other allegations of misconduct and was enlarged to encompass unrelated cases of poor performance; all this while the Applicant was unaware of this adverse development and without an opportunity to defend himself. In these circumstances, the Tribunal considers that other matters were improperly added to the specific allegation of misconduct related to Mr. Scalla's cheques, thus unduly and unjustly aggravating the Applicant's situation.

XVII. Moreover, the Tribunal believes that the injection into the Scalla case of these matters may have acted as an aggravating circumstance, preventing him from receiving clemency from the Secretary-General, who refrained from exercising his discretionary power to grant the Applicant the indemnity provided for in Annex III(c) to the Staff Regulations and Rules. This is all the more serious if the Tribunal takes into consideration that the Scalla case is the first such case in the eleven years of service of the Applicant.

XVIII. For all the foregoing reasons, the Tribunal finds that the failure of the Administration to comply fully and without proper cause with the procedures set out in Chapter IX, Section 20902 of the UNDP Personnel Manual amounts to a denial of due process with regard to the decision of dismissal, and constitutes maladministration entitling the Applicant to compensation.

XIX. The Tribunal accordingly orders the Respondent to pay to the Applicant six months net base salary at the rate in effect on the date of this Judgement, as compensation for the maladministration and the injury from which he has suffered. To this, should be added, as restitution, an amount of US$3,327.18, together with interest, if that amount was deducted from the Applicant's salary in connection with the cheques made out to Mr. Scalla.

XX. With regard to his plea 11(g), requesting the reimbursement of the money deducted from his salaries for his alleged negligence in an earlier case of stolen cheques, the Tribunal declares this plea irreceivable since it does not satisfy the conditions laid down in article 111.3(a) of the Staff Rules.

XXI. All other pleas are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Luis de POSADAS MONTERO
Member

New York, 28 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/511
1 March 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 511

Case No. 534: PARKER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Samar Sen; Mr. Luis de Posadas Montero;

Whereas at the request of George Parker, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 29 December 1989 and 30 January 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 January 1990, the Applicant filed an application, containing the following pleas:

"II. Pleas

10. The Applicant respectfully requests the Administrative Tribunal to make the following findings as well as to take the following decision:

(a) To find that the Joint Appeals Board erred when it decided that the Applicant's appeal did not fall within its competence;

(b) To find that the first round of the 1988-89 Professional selection process in the Department of Public Information was seriously flawed and that these flaws, although subsequently recognized by the Administration, were not retroactively corrected, thus resulting in a continuation of injury to the Applicant;

(c) To find that the Applicant's job description had been modified by the addition of an expanded language requirement which was subsequently waived for another candidate, thus depriving the discontinuation of the Applicant's post of its justification and resulting in continuing injury to the Applicant;

(d) To decide that, in view of the above, the Applicant should be paid an amount equal to two years of his net base salary, this amount being payable also in the event that the Administrative Tribunal should decide to remand the case back to the Joint Appeals Board."

Whereas the Respondent filed his answer on 29 March 1990;

Whereas the Applicant filed written observations on 7 May 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 12 July 1971, as an Associate Information Officer. He was initially offered a probationary appointment at the P-2, Step VI level that was converted to a permanent appointment effective 1 July 1974. During the course of his employment with the UN, the Applicant was promoted to the P-3 level on 1 April 1976, to the P-4 level on 1 April 1980, and to the P-5 level on 1 April 1986, as Senior Information Officer, at the Central News Desk, Press and Publications Division, Department of Public Information (DPI).

At its fortieth session in 1985, the General Assembly, in its resolution 40/237, decided to "establish a Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations" (the Group of 18). In its report to the General Assembly dated 15 August 1986 (A/41/49, Supplement No. 49 (1986)), the Group of 18 recommended that: "A thorough review of the functions and working methods as well as of the policies of [DPI] should be conducted, with a view to bringing its role and policies up to date in order to improve the capacity and ability of the Department to provide information on United Nations activities..." (Recommendation 37(1)). The General Assembly approved this recommendation in its resolution 41/213 of 19 December 1986 and directed the Secretary-General to conduct the reform. In implementing the General Assembly's decision, the Secretary-General also had to take into account Recommendation No. 15 of the Group of 18,

concerning the reduction of 15 percent of "the overall number of regular budget posts" within a period of three years, "particularly in the higher echelons".

During the first quarter of 1987, the Secretary-General appointed a new Under-Secretary-General to head the Department of Public Information. On 23 October 1987, a document entitled "A Plan to Revitalize the Department of Public Information" was submitted to the staff of DPI. On 2 November 1987, the Secretary-General announced to the staff in ST/SGB/Organization/DPI the new organization and functions of the Department.

In a memorandum dated 8 April 1988, the Under-Secretary-General for DPI announced to DPI staff in the Professional levels and above, the procedures to be followed for the selection of staff to fill Headquarters posts at the Professional levels and above under the new staffing table for the Department, attached to the memorandum. She stated that the procedures for the reorganization had been approved jointly by the Assistant Secretary-General, Office of Human Resources Management (OHRM) and herself, following discussions with staff representatives of both Departments, including DPI. In essence, there would be "three rounds of internal DPI advertising for posts at the P-2/1 through P-4 levels, for which only qualified DPI staff [could] apply, and of Secretariat-wide advertising for posts at the P-5 and D-1 levels". The advertising and selection process would be commenced forthwith.

Also on 8 April 1988, the Director, Committee Liaison and Administrative Services, DPI, informed the Applicant that the post he was currently encumbering was to be discontinued under the revised staffing table. In order to be considered for posts under the revised staffing table, he was required to apply for posts to be advertised. In the first round of the selection process, the Applicant applied for one D-1 post and six P-5 posts.

In a memorandum dated 26 August 1988, the Under-Secretary-General for DPI announced the names of staff selected to fill posts circulated in the first round of the staff selection process. The Applicant was not selected for any of these posts.

On 2 September 1988, the Applicant, together with six other DPI staff members, requested the Secretary-General to review the administrative decision announcing the results of the first round of the selection process as well as to stay administrative action pending a review. On 14 September 1988, the President of the Staff Committee wrote to the Under-Secretary-General for DPI to express her concern about possible departures from the principle that priority should be given to lateral assignments of staff in the first round of the selection process.

On 28 September 1988, the Assistant Secretary-General, OHRM, informed the Applicant and the other six DPI staff members who had requested review of the decision, that only the first phase of a three-stage selection process had been concluded and that "[t]he two forthcoming rounds of selection for posts at Headquarters together with available UNIC [United Nations Information Centre] posts should provide ample opportunity for the Department to address the concerns [they] raised in [their] letter to the Secretary-General". He further noted that he had requested the Under-Secretary-General for DPI to place "primary emphasis on the lateral redeployment of staff" and that "the implementation of those decisions which entail promotion to the P-5 level be deferred until phases 2 and 3 of the selection process have been completed, since further adjustments or shifts may be called for at that stage". On 4 October 1988, the Under-Secretary-General for Administration and Management informed the Applicant and the other six DPI staff members of his decision that "it will be in the interest of the Organization and of good administration, that the selection process should move into phases 2 and 3", and that at the end of those phases "a general review of staff, particularly those at the P-5 level, will be undertaken to ensure optimum placement".

On 28 October 1988, the Applicant filed a preliminary statement of appeal with the Joint Appeals Board (JAB) and on 1 December 1988, he submitted a full statement of appeal against the announcement dated 26 August 1988, of the results of the first phase of the selection process. He further requested that implementation of the administrative decision announcing that the selection process should move into phases 2 and 3 be suspended.

The second phase of the selection process was initiated on 8 November 1988, with the circulation of a list of the posts to be filled in that phase. The results of the second round were announced on 8 March 1989. The Applicant was not included among those staff who were selected as a result of the second phase of the selection process. The third phase of the selection process was initiated on 5 May 1989.

The Board adopted its report on 27 June 1989. Its considerations, conclusion and recommendation read as follows:

"Considerations

45. The Panel was asked to consider the appellant's allegation that his 'contractual rights' had been violated through the use of an improper staff selection process applied in connection with the restructuring of DPI.

46. The Panel noted that the selection process in question was to be effectuated in three rounds, the first of which had already been completed at the time this appeal was filed, and the second and third of which had not yet been finalized (as of this moment, the second round has been completed).

47. The Panel also noted the appellant continues to serve at his previous level.

48. The Panel observed that under Staff Regulation 11.1, staff members may appeal 'against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules...'.

49. Based upon the foregoing, the Panel was of the view that the appellant in the present case failed to identify any specific injury which would be appealable under Chapter XI of the Staff Rules. It appeared to the Panel that since the selection process has not yet been completed, the appellant's allegation of injury was premature. In fact, the Panel noted that at this stage it was impossible to determine whether or not the selection process would result in any injury to the appellant.

50. Accordingly, the Panel felt that it was not competent to consider the merits of the case at this point in time, without prejudice to any decision by the Joint Appeals Board to do so at a later stage when and if the appellant is able to demonstrate that his terms of appointment have been affected.

Conclusion and recommendation

51. The Panel decides that the present case does not fall within its competence and, accordingly, makes no recommendation in support of the appeal."

On 8 August 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken note of the Board's conclusions and decision that it was not competent to entertain the appeal.

Also on 8 August 1989, the Under-Secretary-General, DPI, announced to the staff of DPI the results of the third round of the selection process. The Applicant was not included among those selected.

On 30 January 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Joint Appeals Board erred in deciding that the Applicant's appeal did not fall within its competence.

2. The arbitrary and illegal staff selection process employed to the detriment of the Applicant is at variance with Staff Rules and Regulations, particularly staff regulations 2.1, 4.2 and 9.1(a), as well as staff rule 104.14(f)(iii).

3. The modification of the Applicants's job description to expand the language requirement, a requirement subsequently waived for another candidate, not only augmented the harm to him but also negated the rationale for discontinuing his post.

Whereas the Respondent's principal contentions are:

1. Staff have no right of appeal unless their terms of appointment are violated.

2. Where the Secretary-General reorganizes a Department in the Secretariat, a staff member can only challenge the reorganization by showing that it was improperly motivated.

The Tribunal, having deliberated from 12 February to 1 March 1991, now pronounces the following judgement:

I. The Applicant essentially contends that the procedures and decisions taken by the Department of Public Information (DPI) in connection with a reorganization of its structure and functions eroded or violated contractual and other rights as defined in the Staff Regulations and Rules or as deduced from established practice. The Respondent's contention is that everything that the Applicant complains of was done under the authority of the General Assembly and through the legitimate exercise of the Secretary-General's discretionary powers. The Joint Appeals Board (JAB), which reviewed the Applicant's complaint in June 1989, considered that, as argued by the Respondent, since only the first phase of the staff reorganization had been undertaken and two more phases were still to come, no specific injury to the Applicant could be identified at that time. The JAB concluded that "the appellant's allegation of injury was premature. In fact, the Panel noted that at this stage it was impossible to determine whether or not the selection process would result in any injury to the appellant" (emphasis added). Thus, the JAB itself kept the door open for further consideration and examination and indeed stated specifically that its conclusion that the complaint was premature was "without prejudice to any decision by the JAB" to consider the merits of the case "at a later stage". Since the JAB did not reach the question of injury to the Applicant from the administrative decisions which were taken, the Tribunal is unable to deal with that issue at present. However, if there had been improper action which reduced the number of posts potentially available for the Applicant, that might have established injury to the Applicant sufficient to warrant consideration of the merits by the JAB.

II. After the JAB wrote its report on 27 June 1989, two more rounds of selection were undertaken and the process of restructuring the DPI was apparently completed. The application to the Tribunal indicates that the issues raised by the Applicant and rejected by the Respondent still need further examination. In particular, the JAB may wish to analyse whether the various administrative measures (eg. action taken at different times by the

Under-Secretary-General for DPI in connection with the restructuring of the Department and consequent staff deployment) infringed the "contractual rights" of staff members, whether the discretion of the Secretary-General, undoubtedly of wide application, was properly exercised, and whether in this instance staff members can legitimately claim that their interests have been adversely affected "as a result of unfair or improper procedures, or the injection of extraneous motives in connection with these procedures" (Cf. Judgement No. 412, Gross (1988)). Finally, the documents before the Tribunal do not show how, why and by whom, the requirement of language qualification initially prescribed for any post was waived; the reasons for such a waiver (or waivers) would also need analysis.

III. In view of the above, the Tribunal remands the case to the JAB for further review of all of the issues raised by the Applicant.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Luis de POSADAS MONTERO
Member

New York, 1 March 1991

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/512
1 March 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 512

Case No. 542: KORB

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Arnold Kean; Mr. Luis de Posadas Montero;

Whereas at the request of Victoria Korb, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 26 May, 26 July and 26 October 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 26 October 1989, the Applicant filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 25 February 1990, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"Pleas

1. The Applicant respectfully requests the Administrative Tribunal to find that:

(a) The Respondent's decision not to renew the Applicant's contract beyond 22.11.87 was based on discriminatory, prejudiced and ill-founded assessments of her performance;

(b) The Respondent, in rejecting the findings and recommendations of the Panel on Discrimination and other Grievances out of hand, had denied the Applicant proper redress through a procedure he has himself established;

(c) The Respondent denied the Applicant due process by:

(i) Imposing arbitrary time limitations for the submission of the Applicant's request for a summary hearing by the Joint Appeals Board [JAB],

(ii) failing to respond to her request for a conciliatory procedure,

(iii) accepting a Joint Appeals Board report based on hearings of ITC [International Trade Centre] staff in the absence of the Applicant or her representative,

(iv) accepting [a] JAB report which improperly based its recommendations on its assessment of the Applicant's performance in contraven- tion to staff rule 111.2(k).

(d) The Respondent has failed to properly and fairly administer his staff, specifically the Applicant, by:

(i) Giving her inappropriate and/or insuf- ficiently defined assignments,

(ii) allowing her performance to be judged on the basis of ill-defined criteria,

(iii) failing to further enquire into or to remedy patently discriminatory actions by one of the Applicant's supervisors,

(iv) failing to take remedial action on managerial deficiencies within ITC which had been identified both by a PER [performance evaluation report] Rebuttal Panel and by the Panel on Discrimination and Other Grievances and which had specifically affected the Applicant.

2. Wherefore the Applicant most respectfully requests the Administrative Tribunal to order:

(a) The Applicant's reinstatement in ITC or in an appropriate post commensurate with her qualifications and experience within the UN system of organizations,

(b) her record of service in the UN (ITC) be effectively cleared of all discriminatory and prejudicial assessments to show that she has performed her functions with the competence and dedication required of a staff member of the UN,

or failing (a)

(c) the payment of compensation for the disruption to the Applicant's career of an amount equivalent to four years net base salary at grade P.2/XI,

(d) the further payment of compensation for the moral suffering and professional prejudice inflicted on the Applicant in an amount equivalent to two years net base salary at P.2/XI."

Whereas the Respondent filed his answer on 30 May 1990;

Whereas the Applicant filed written observations on 22 August 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of the International Trade Centre (ITC), an organ of both the United Nations Conference on Trade and Development, and the General Agreement on Tariffs and Trade (GATT) on 19 April 1982. She was initially offered a two-year fixed-term appointment as an Associate Programme Officer at the P-2, Step X level at the Division of Programme, Resources and External Relations (DPRER). According to the record of the case, the Applicant had previously served for two years, from 1979 to 1981, with the United Nations Development Programme as a Junior Programme Officer for Indonesia and the Philippines.

In a first performance evaluation report, evaluating the Applicant's performance during her first 10 months of service, the Chief, Programme and Planning Monitoring Section, DPRER, who acted as First Reporting Officer, gave the Applicant ten "B" (Very Good) ratings and three "C" (Good) ratings. The Director, DPRER, rated the Applicant's performance as a "very good performance". In a second performance evaluation report, evaluating

the Applicant's performance from 1 March 1983 to 31 October 1984, the same First Reporting Officer gave the Applicant eight "B" (Very Good) ratings and five "C" (Good) ratings. A new Director, DPRER, rated the Applicant's overall performance as "a good performance" and stated his belief "that it would be useful if the evaluative judgements in [the] report could be checked under different circumstances in another section in ITC". The Applicant had, during the reporting period, expressed her interest in a transfer to another section of ITC, the Division of Technical Co-operation or the Division of Product and Market Development.

The Applicant's appointment was extended for a further two-year fixed-term period, through 18 April 1987. Effective 1 July 1985, the Applicant was transferred to the Division of Technical Co-operation, Office for Africa.

At a staff meeting held on 1 July 1985, the Chief of the Office for Africa informed the staff that a French-speaking Desk Officer had been transferred to another Division and that the Applicant, who was able to "handle work only in English", would replace him. According to the minutes of the meeting, the Desk Officers of the section expressed their concern at the transfer of "one English-speaking Junior Officer, who was not accepted by any other Office in ITC ... without prior consultation with the Chief of [the] Office". Subsequently, four staff members who had attended the meeting disassociated themselves from the account given in the minutes on the ground that it "gave the impression that a fellow colleague who was being transferred to the Office for Africa, was a principal subject of discussion" and that "apart from the fact that [they] were not competent to comment on her capabilities, this was neither correct nor fair to her".

On 24 July 1986, the Applicant's prior supervisor and First Reporting Officer in previous evaluation reports, evaluated the Applicant's performance from 1 November 1984 to 3 July 1985, prior to her transfer to the Office for Africa, and reiterated the same ratings he had given her in her previous report, but without providing any comments thereon. The Director, DPRER, rated the Applicant's overall performance as a "good performance" and stated his belief that the Applicant's "performance should be tested in a different working environment". He also commented: "The evaluation may indeed appear somewhat generous".

On 24 September 1986, the Chief, Office for Africa, DTC, evaluated the Applicant's performance from 4 July 1985 to 31 May 1986, at the Office for Africa. Acting as First Reporting Officer, she gave the Applicant five "C" (Good) ratings, in competence, initiative, sense of responsibility and dependability as regards working hours, effectiveness in planning and organization of work, and oral expression; five "D" (Fair) ratings in quality and quantity of work accomplished, ability to meet schedules, effectiveness in maintaining harmonious working relations, and skill in producing a solution, and three "E" (somewhat below standard) ratings in ability to work independently or with minimal supervision, ability to negotiate and persuade, and written expression. The Chief, Office for Africa, did not supplement the ratings with a statement giving an explanation or examples illustrative of the ratings, as required. The Deputy Executive Director rated the Applicant's overall performance as "Fair".

Effective 27 October 1986, the Applicant was transferred to the Office for Asia and the Pacific.

The Applicant instituted a rebuttal procedure, contesting the report evaluating her services at the Office for Africa, in accordance with administrative instruction ST/AI/240/Rev.1. A Panel was constituted to investigate the rebuttal and it submitted a report to the Director, Department of Personnel Management on 3 February 1987. Although it concurred "with the accuracy of the ratings" given in the report, it pointed out "several mitigating factors" to be brought to the attention of management.

In the Panel's opinion, the performance evaluation "appeared to assume a level of responsibility which went beyond that which should normally be held by a P-2 officer"; the Applicant was given "too early responsibility for a difficult country [Ghana], and less than adequate arrangements were made for her on-the-job supervision and training". Furthermore, 55 days of sick leave during an eleven-month reporting period, "would have affected the quantity of work accomplished and the ability to meet deadlines".

In a further performance evaluation report, evaluating the Applicant's performance from 27 October 1986 to 18 March 1987, the Chief, Office for Asia and the Pacific, gave the Applicant one "B" (Very Good)

rating, four "C" (Good) ratings and one "D" (Fair) rating. The Deputy Executive Director refused to evaluate her overall performance on the grounds that he was "unable" to do so "on the basis of partial assessment of the First Reporting Officer". He noted however that the Applicant's performance appeared "to have improved".

On 28 March 1987, the Applicant requested an investigation of her employment situation by the Panel on Discrimination and Other Grievances in the U.N. Secretariat (Panel on Discrimination). She alleged that she had been subjected to conditions of work which "through no fault of [her own, had] resulted in [her being] almost consistently treated in an unfair manner" by ITC since the commencement of her employment and that her professional qualifications and previous experience had not been properly utilized.

The Applicant's appointment was extended for further fixed-term periods of two months and twelve days, through 30 June 1987; one month, through 31 July 1987, and three months, through 31 October 1987.

On 5 August 1987, the Applicant was informed that her appointment would not be extended beyond 31 October 1987. (A further extension was nonetheless given from 1 November 1987 to 23 November 1987, while the Applicant was on sick leave).

On 17 August 1987, the Applicant requested the Secretary-General to review the administrative decision not to renew her fixed-term appointment beyond 31 October 1987. She also requested the Secretary-General to suspend the administrative decision not to renew her fixed-term appointment until the Panel on Discrimination's investigation was completed.

On 31 August 1987, the Chief, Administrative Review Unit, informed the Applicant of time-limits and procedures. In a reply dated 29 September 1987, the Applicant sought clarification concerning the procedures before the Joint Appeals Board (JAB) and requested a conciliation procedure as provided for in staff rule 111.2(a).

In the meantime, the Panel on Discrimination authorized a Geneva-based staff member to conduct a "proxy investigation" on its behalf. That investigation, as described in the Panel on Discrimination's memorandum of 15 July 1987, to the Assistant-Secretary-General for Personnel Services,

concluded that ITC had "bent over backwards" to accommodate the Applicant, who, the proxy investigator also concluded, had "an attitude problem". Then, the Panel on Discrimination disassociated itself from the proxy investigator's conclusions on the Applicant's case. In its final report dated 1 October 1987, to the Assistant Secretary-General for Personnel Services, the Panel on Discrimination concluded that the Applicant was "justified in almost all of her complaints" and that the Applicant had essentially been the victim of "hearsay, personal opinions of a biased nature, or downright calumny". It recommended that the Applicant's appointment be extended for a two-year period during which she should be given proper guidance and supervision. On 21 October 1987, the Assistant Secretary-General for Personnel Services forwarded the Panel on Discrimination's report to the Executive Director, ITC, for appropriate action. The report was brought to the attention of the ITC Joint Appointment and Promotion Board (Appointment Board) on 30 October 1987, which, following re-consideration of the Applicant's case, concluded that there was no justification for changing its recommendation that the Applicant's fixed-term appointment not be renewed.

Not having received a substantive reply to her request for an administrative review, on 5 November 1987, the Applicant lodged an appeal with the Geneva JAB, which first considered the Applicant's request for a suspension of the administrative decision not to renew her fixed-term appointment. The JAB adopted its report on the Applicant's request for suspension of the Respondent's administrative decision on 10 December 1987. It concluded that the Secretary-General should grant that request up to 29 February 1988, so as to allow for good faith consideration and action on the recommendations of the Panel on Discrimination. On 23 February 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to take no action on her request on the grounds that:

(a) the recommmendations of the Panel on Discrimination had already been considered and had not been accepted, and

(b) since the contested decision had been implemented on 23 November 1987, prior to submission of the JAB's report, her request for suspension of action had become moot. The JAB adopted its report on the merits of the

case on 20 October 1988. Its conclusions and recommendations read as follows:

> VI. CONCLUSIONS AND RECOMMENDATIONS
>
> 23. Thus, the Panel is unable to recommend that the ITC rescind its decision not to renew the appellant's fixed-term appointment. It recognizes though that the appellant has a very good academic background and that her competence and skills could be put to good use in some analytical, rather than operative work, for which there may be opportunities in the United Nations system. The fact that her effectiveness and prospects were confined in a very limited environment, which is the result of her being hired for service only within ITC, is to be regretted.
>
> ..."

On 29 November 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to maintain the contested decision and to take no further action on the case.

On 25 February 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions read as follows:

1. The decision taken by ITC not to renew the Applicant's contract was based on prejudicial and ill-founded assessments of her performance.

2. Those assessments resulted from gravely deficient managerial practices which, though identified, were allowed to continue unchallenged.

3. Previous attempts to obtain redress were frustrated either because no heed was paid to findings and recommendations made by administrative review panels or because safeguards provided for in the staff rules were overlooked and/or disregarded.

4. The foregoing circumstances resulted in a violation of due process vis-à-vis the Applicant.

Whereas the Respondent's principal contentions read as follows:

1. The Respondent's decision not to renew the Applicant's fixed-term appointment was a valid exercise of his discretionary authority; it was not vitiated by prejudice nor based on inadequate or erroneous information.

2. The Applicant was accorded the process due her in respect of the proceedings of the Panel on Discrimination and the Joint Appeals Board.

The Tribunal, having deliberated from 15 February to 1 March 1991, now pronounces the following judgement:

I. The Applicant contests the Respondent's decision not to renew her fixed-term appointment beyond 22 November 1987, and requests the Tribunal to order her reinstatement in the International Trade Centre (ITC) or in an appropriate post within the United Nations system.

II. The Tribunal observes that the Applicant was employed on fixed-term appointments. According to staff rule 104.12(b), fixed-term appointments carry no right of renewal or of conversion to any other type of appointment. Moreover, this provision was incorporated verbatim in all of the Applicant's appointments. According to staff rule 109.7(a), such appointments expire automatically and without prior notice.

III. In this case, the Applicant claims that renewal of her appointment is based on three grounds:

First: That the non-renewal of her fixed-term appointment was due to prejudice;

Second: That she had a legal expectancy of renewal; and

Third: That the decision not to renew her appointment was flawed by breach of due process.

IV. As regards the first claim, the Applicant invokes as evidence of deliberate prejudice against her: the opinions expressed at a staff meeting of the Office for Africa held on 1 July 1985, prior to her transfer, in which it was pointed out that such transfer was not desirable; her performance evaluation report for the period running from July 1985 to May 1986 and the report of the Rebuttal Panel to whom this report was submitted for review.

V. It is the opinion of the Tribunal that the views expressed at that staff meeting are not evidence of prejudice against the Applicant. It was only the issue of the suitability of the transfer of a staff member of the Applicant's level and language capability to the post of Associate Trade Promotion Officer that was raised at the meeting. The objections raised in connection with her transfer in no way reflected any personal feeling against her as an individual. Furthermore, four staff members who attended the meeting, subsequently stated in writing that the minutes of the meeting erroneously conveyed the impression that the Applicant's pending transfer was the principal subject of discussion. According to them, the purpose of the meeting was to convey a constructive message to management, concerning the organization of the Office.

VI. The Applicant also considered her performance evaluation report (PER) for the period from July 1985 to May 1986, as an instance of prejudice and consequently, rebutted it. The Rebuttal Panel concluded that the ratings in the Applicant's report were accurate, although there were several "mitigating factors".

VII. The Tribunal has been unable to find substantial evidence of the existence of any arbitrary or wrongful intentions or motives behind the ratings given to the Applicant. On the other hand, the Tribunal concurs with the Rebuttal Panel that "the performance evaluation appeared to assume a level of responsibility which went beyond that which should normally be held by a P.2 Officer" and that "the staff member was allocated too early responsibility for a difficult country", and also that "arrangements for the on-the-job training and supervision of the staff member were less than adequate". It is the Tribunal's view that these factors, though not due to prejudice, denote a certain negligence in dealing with the Applicant that may have led to the non-renewal of her fixed-term appointment.

VIII. The issue of prejudice was brought by the Applicant before the Panel on Discrimination and Other Grievances in the UN Secretariat (Panel on Discrimination). In its final report, the Panel on Discrimination stated that "Dr. Korb is justified in almost all of her complaints".

IX. The Tribunal, having given due consideration to the Panel on Discrimination's report, cannot concur in it because of lack of evidence to substantiate its conclusions.

X. Moreover, the Tribunal notes that the renewal of the Applicant's appointment was discussed on several occasions: in March 1987, by the Executive Director, along with her present and past supervisors; again in June 1987, by the Executive Director and her new supervisor; and finally by the Joint Appointment and Promotion Board in June and October 1987. This sequence of events shows that the non-renewal of the Applicant's appointment was not decided upon rashly or by a single person or small group of persons prejudiced against her.

XI. The Tribunal, having reached the conclusion that no evidence of prejudice on the part of the Administration has been produced, is unable to order any modification of the Applicant's service record as requested.

XII. The Applicant also claims that the non-renewal of her fixed-term appointment was unlawful because ITC is governed by the "Personnel Policy Guidelines and Practices of the ITC" and according to those Guidelines fixed-term appointments carry an expectancy of renewal. The Tribunal is unable to share this view.

XIII. Paragraph I.5 of the Guidelines states that: "Staff members whose worth to the Centre has been demonstrated will subsequently be eligible for consideration for extensions...". This provision in no way alters the general system in force, and in no way limits the discretion of the Secretary- General. It only provides that "worthy" staff members will be "eligible for consideration" for renewal (emphasis added). This amounts to a statement that worthy staff members may be renewed, not that they shall be renewed. It is also to be noted that the Introduction to the Guidelines clearly statesthat they are subject to the Staff Regulations and Rules of the United Nations, precluding any interpretation of that text that would run counter to those rules and regulations, in particular to staff rule 104.12(b).

XIV. The Applicant further contends that she has been denied due process by:

(a) "rejecting the findings and recommendations of the Panel on Discrimination ... out of hand";

(b) "imposing arbitrary time limitations for the submission of the Applicant's request for a summary hearing by the Joint Appeals Board;"

(c) "failing to respond to her request for a conciliatory procedure";

(d) "accepting a Joint Appeals Board report based on hearings of ITC staff in the absence of the Applicant or her representative";

(e) "accepting [a] JAB report which improperly based its recommendations on its assessment of the Applicant's performance in contravention to staff rule 111.2(k)".

XV. In connection with the rejection of the findings of the Panel on Discrimination, the Tribunal notes that the original decision not to renew the Applicant's appointment was taken while the proceedings of the Panel on Discrimination were still under way. Nevertheless, short extensions were granted in order to allow the Panel to finish its work. Also, the report of the Panel on Discrimination was received and considered by the Joint Appointment and Promotion Board the same day it decided to ratify its previous recommendationnot to renew the Applicant's appointment. It is the Tribunal's view that, though it would have been advisable for the Administration to act less hastily, the basic principles of due process were respected as far as the consideration of the Panel on Discrimination's report is concerned.

XVI. As far as the allegation that arbitrary time limitations were imposed for the submission of the Applicant's request for a summary hearing by the JAB, it is the Tribunal's opinion that staff rule 111.2(a) was in no way violated by the Administration when fixing 31 October 1987, as the deadline for filing the Applicant's appeal.

XVII. The Applicant also asserts that due process was not observed when the Administration failed to respond to her request for a conciliatory procedure. According to staff rule 111.2(a) the decision to resort to this

procedure rests solely with the Respondent. It follows that no breach of due process can be claimed if the Applicant's request for conciliation of the case met with no direct response.

XVIII. The Applicant also asserts that staff rule 111.2(k) was not observed. The Tribunal notes that staff rule 111.2(k) is not applicable in the Applicant's case since hers was a case of non-renewal of a fixed-term appointment and not a case of termination on grounds of inefficiency.

XIX. A breach of the principle of due process is also claimed because the JAB heard several witnesses in the absence of the Applicant or her representative. In the opinion of the Tribunal, this fact, not contradicted by the Respondent, constitutes a serious flaw in the proceedure of the JAB, since it is an accepted principle of due process that witnesses should always be heard in the presence of the parties. "Procedural unfairness is, in itself, wrong and is to be evaluated in the circumstances of the case in which it is found". (Judgement No. 507, Fayache (1991), (para. XV).

XX. As to the Applicant's claim that she was given inappropriate and/or insufficiently defined assignments and that her performance was judged on the basis of ill-defined criteria, the Tribunal notes that these allegations, coincident with what the Rebuttal Panel calls "mitigating circumstances", have not been contested by the Respondent and must therefore be considered as well-founded. In the Tribunal's opinion, they indicate a certain degree of negligence in dealing with the Applicant's situation, entailing some responsibility on the part of the Administration.

XXI. The Tribunal, having considered all the circumstances of the case, finds:

1. That the decision not to renew the Applicant's fixed-term appointment was not due to prejudice;

2. That the Applicant had no legal expectancy of such renewal;

3. That the Applicant suffered injury from a certain degree of negligence on the part of the Administration, as well as from breaches of due process, for which the Tribunal awards her compensation.

XX. In view of the foregoing:

1. The Tribunal orders the Respondent to pay to the Applicant one month net base salary at the rate in effect at the time of her separation from service, as compensation.

2. All other pleas are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Luis de POSADAS MONTERO
Member

New York, 1 March 1991

R. Maria VICIEN-MILBURN
Executive Secretary